

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JACK L. JORDAN, an
individual,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
LABOR

Defendant.

NO. CV-07-5011-EFS

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

A hearing occurred in the above-captioned matter on September 4, 2008, in Spokane. Tom H. Foulds appeared on behalf of Plaintiff Jack L. Jordan; Rolf H. Tangvald appeared on behalf of Defendant United States Department of Labor. Before the Court were Plaintiff's Motion for Summary Judgment (Ct. Rec. 82) and Defendant's Motion for Summary Judgment (Ct. Rec. 79). After reviewing the submitted material and relevant authority and hearing oral argument, the Court is fully

1 informed. This Order serves to memorialize and supplement the Court's
2 rulings.

3 I. Background

4 A. EEOICPA Statutory Background

5 In 2000, Congress passed the Energy Employees Occupational Illness
6 Compensation Program Act of 2000 ("EEOICPA"), 42 U.S.C. § 7384, *et seq.*
7 EEOICPA provides benefits to individuals with illnesses caused by
8 exposure to radiation and other toxic substances in the course of their
9 work related to the nuclear weapon production and testing programs of the
10 United States Department of Energy or its predecessor agencies. 42
11 U.S.C. § 7384.

12 EEOICPA Part B allows covered employees or their eligible survivors
13 to receive a \$150,000 lump-sum payment and medical benefits for certain
14 illnesses from radiation, beryllium, or silica exposure while working at
15 DOE facilities. 20 C.F.R. § 30.0. EEOICPA Part E allows covered
16 employees or their eligible survivors to receive lump-sum payments and
17 medical benefits based on a worker's permanent impairment and/or calendar
18 years of qualifying wage-loss. *Id.*

19 The Department of Labor ("DOL") is primarily responsible for
20 administering EEOICPA Part B and E claims. Any person seeking benefits
21 must file a claim with the DOL's Office of Workers' Compensation Programs
22 ("OWCP"). 20 C.F.R. §§ 30.100 & 30.101. If a person claims to be a
23 deceased employee's survivor, sufficient evidence of the claimed
24 relationship must be furnished.

25 After reviewing a claim, the OWCP issues a recommended decision.
26 20 C.F.R. § 305. The claimant then has sixty (60) days to file

1 objections with the Final Adjudication Branch ("FAB"). 20 C.F.R. § 310.
2 The FAB will consider a claimant's objections and hold a hearing, if
3 requested, before issuing the final agency decision. 20 C.F.R. §§ 30.314
4 & 30.316. An OWCP recommended decision automatically becomes the final
5 agency decision one year after the agency receives the claimant's
6 objections. 20 C.F.R. § 30.316(c). This provision safeguards against
7 unnecessary agency delay.

8 **B. Plaintiff's EEOICPA Claims**

9 On October 15, 2002, Plaintiff filed an EEOICPA Part B claim seeking
10 benefits for his late uncle's death from lung cancer. Plaintiff's uncle
11 was a former worker at the Hanford Nuclear Site and qualified for
12 EEOICPA benefits. Plaintiff claimed he was an eligible surviving child
13 because he had a parent-child relationship with his uncle.

14 On December 17, 2002, the Division of Energy Employees Occupational
15 Illness Compensation ("DEEOIC") recommended denying Plaintiff's Part B
16 claim for failure to establish that he is an eligible surviving child.
17 A month later, the FAB vacated the recommended decision, remanding the
18 claim for further development.

19 On April 12, 2003, Plaintiff sent additional information to the DOL,
20 including why he considered his uncle a father. On September 23, 2003,
21 the Chief of the Branch of Policies, Regulations and Procedures (a
22 division of the DOL) concluded Plaintiff, in the absence of additional
23 information, does not qualify as an eligible surviving child. On October
24 3 and 21, 2003, the DEEOIC sought additional information about
25 Plaintiff's relationship with his uncle. Plaintiff did not respond.

1 On June 9, 2005, Plaintiff's representative informed the DEEOIC that
2 his client wished to file a Part E claim. The DEEOIC received
3 Plaintiff's Part E claim the following week. On October 27, 2005, the
4 DEEOIC requested additional documentation to show proof of adoption.

5 The following week on November 3, 2005, Plaintiff's representative
6 sent a letter to the DEEOIC arguing that Plaintiff qualifies as an
7 eligible surviving child based upon a Washington Supreme Court case
8 released that day discussing *de facto* parentage. On November 16, 2005,
9 the DEEOIC recommended denying Plaintiff's Part B and Part E claims.
10 This recommendation did not fully address Plaintiff's recently raised
11 legal arguments.

12 On January 12, 2006, Plaintiff objected to the recommendation and
13 requested an oral hearing, which took place on March 30, 2006. At the
14 hearing, Plaintiff's representative raised the *de facto* parent legal
15 argument.

16 On July 15, 2006, the FAB forwarded Plaintiff's claim to the
17 DEEOIC's Branch of Policies, Regulations and Procedures ("BPRP")
18 requesting guidance on Plaintiff's legal arguments. On December 12,
19 2006, the BPRP requested a legal opinion from the Office of the Solicitor
20 of Labor ("SOL"). On February 26, 2007, the SOL issued a legal
21 memorandum briefing Plaintiff's arguments. The following week, the BPRP
22 sent the legal memo to the FAB, satisfying the FAB's earlier request for
23 legal guidance.

24 Meanwhile, the DEEOIC's recommended decision automatically became
25 the final agency decision on January 17, 2007. Plaintiff sought judicial
26 review with this Court on March 9, 2007. On April 30, 2007, the Director

1 vacated the DOL's final agency decision, remanding the case to fully
2 consider Plaintiff's recent raised *de facto* parentage argument. After
3 reviewing Plaintiff's arguments, the DOL issued its final agency decision
4 denying Plaintiff's claim for benefits on November 7, 2007.
5 (Ct. Rec. 34.)

6 **II. Discussion**

7 **A. Standard**

8 The Administrative Procedures Act (APA) sets forth standards
9 governing judicial review of decisions made by federal administrative
10 agencies. *Mountain Rhythm Res. v. FERC*, 302 F.3d 958, 963 (9th Cir.
11 2002). APA section 706(2) (A) provides that a reviewing court may set
12 aside agency decisions found to be "arbitrary, capricious, an abuse of
13 discretion or otherwise not in accordance with law." 5 U.S.C. §
14 706(2) (A). The arbitrary and capricious standard is appropriate when
15 resolving factual disputes implicating substantial agency expertise.
16 *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989). Review
17 under the standard is narrow and the reviewing court may not substitute
18 its judgment for that of the agency. *U.S. Postal Serv. v. Gregory*, 534
19 U.S. 1, 6-7 (2001); *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir.
20 2008). The agency, however, must articulate a rational connection
21 between the facts found and the conclusions made. *Kern County Farm*
22 *Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (internal quotations
23 and citations omitted).

24 The reviewing court must determine whether the decision was based
25 on a consideration of the relevant factors and whether there has been a
26 clear error of judgment. *Marsh*, 490 U.S. at 378. The court may reverse

1 under the arbitrary and capricious standard only if the agency relied on
2 factors that Congress did not intend for it to consider, entirely failed
3 to consider an important aspect of the problem, offered an explanation
4 for its decision that runs counter to the evidence before the agency, or
5 is so implausible that it could not be ascribed to a difference in view
6 or the product of agency expertise. *Env'tl. Prot. Info. Ctr. v. Simpson*
7 *Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001); *Port of Seattle, Wash.*
8 *v. F.E.R.C.*, 499 F.3d 1016, 1035 (9th Cir. 2007). Finally, an agency's
9 decision can be upheld only on the basis of the reasoning in that
10 decision. *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir.
11 1997).

12 **B. Statutory Definition of Child**

13 EEOICPA regulations define "child" as a "recognized natural child,
14 a stepchild who lived with an individual in a regular parent-child
15 relationship, and an adopted child. . . ." 42 U.S.C. § 7384s(e) (3) (B).
16 The DEEOIC has exclusive discretion to interpret this definition. 20
17 C.F.R. § 30.1. Noting the expansive statutory language, the DEEOIC
18 recently expanded "child" from its original definition to include: (1)
19 legitimate children, and (2) posthumously born legitimate children. (AR
20 506.) As defined under the EEOICPA, "child" is, therefore, limited to
21 biological children, stepchildren, or adopted children. *Id.*

22 **C. FAB's Final Denial Decision**

23 Plaintiff argues that FAB's final denial decision should be vacated
24 because it arbitrarily and capriciously failed to consider (1) enlarging
25 the statutory definition of "child" to include *de facto* children, (2)
26 relevant state law definitions of "child" in statutory interpretation,

1 and (3) the proper nature of his relationship with Ray Jordan. Defendant
2 responds that FAB's decision should not be overturned because it is
3 neither arbitrary nor capricious.

4 **1. FAB Consideration of de facto Children Under the EEOICPA**

5 Plaintiff first alleges that FAB failed to consider expanding the
6 statutory definition of "child" to include *de facto* children as set forth
7 in *In re Parentage of L.B.*, 155 Wn.2d 679 (2005). (Ct. Rec. 82 at 3.)
8 Defendant responds that not only did FAB's decision consider including
9 *de facto* children, but also it extensively analyzed the proper scope of
10 "child" under the EEOICPA. (Ct. Rec 88 at 4.)

11 In *In re Parentage of L.B.*, the Washington Supreme Court considered
12 whether a parent figure who participated in raising a non-biological
13 child can be considered a *de facto* parent and assigned legally-binding
14 visitation rights. The court concluded that an individual who is not a
15 biological, adoptive, or stepparent can be considered a *de facto* parent
16 if they satisfy a four-part test¹. Plaintiff vehemently argues that Ray
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18

19 ¹ An individual must prove that: (1) the natural or legal parent of
20 the child consented to and fostered the parent-like relationship, (2)
21 the individual and the child lived together in the same household, (3)
22 the individual assumed the many obligations of parenthood without
23 expectation of financial compensation, and (4) the individual has been
24 in a parental role for a length of time sufficient to have established
25 a bonded, dependent parental relationship with the child. *In re*
26 *Parentage of L.B.*, 155 Wn.2d at 708.

1 Jordan qualifies as his *de facto* parent under *In re Parentage of L.B.*'s
2 four-part test.

3 Contrary to Plaintiff's assertion, FAB's final decision did analyze
4 *In re Parentage of L.B.*, determining that it did not apply to EEOICPA
5 claims because (1) equitable concerns such as a child's best interests -
6 paramount in state dependency cases - have no place in EEOICPA claims
7 adjudication, (2) the case created and defined *parental* rights and
8 obligations, not *children's* rights and obligations, and (3) Washington
9 law is not controlling on the EEOICPA claims adjudication process. FAB
10 further noted that under DEEOIC interpretations, dependency alone is
11 insufficient to establish "child" status. (AR 506.) Given DEEOIC's
12 broad discretion to interpret the definition of "child" and FAB's lengthy
13 consideration of *In re Parentage of L.B.*, the FAB sufficiently considered
14 Plaintiff's *de facto* child argument and articulated a rational basis for
15 declining to extend coverage. FAB's decision is neither arbitrary nor
16 capricious.

17 **2. Applicability of Washington State Law**

18 Plaintiff next argues that the DOL improperly abandoned Washington
19 law as guidance for its statutory interpretation of "child" and, instead,
20 substituted its own administrative judgment. (Ct. Rec. 82 at 7.)
21 Defendant responds that the alleged "abandonment" of state law as
22 guidance exclusively affected stepchild claims unrelated to Plaintiff's
23 case. (Ct. Rec. 88 at 6.)

24 While regulatory agencies do not establish rules of conduct to last
25 forever, an agency changing its course by rescinding a rule is obligated
26

1 to supply a reasoned analysis for the change. *State Farm Mut. Auto. Ins.*
2 *Co.*, 463 U.S. at 57.

3 Here, Defendant was not required to explain its 2003 procedural
4 modification to its claims adjudication process because the modification
5 only affected stepchild claims. Plaintiff's claim is not based on
6 stepchild status; rather, Plaintiff insists he qualifies as a *de facto*
7 child. Accordingly, the DOL's modifications are irrelevant to
8 Plaintiff's claim and Defendant is not required to provide a reasoned
9 analysis for the change.

10 Plaintiff similarly fails to identify any authority that requires
11 the agency to apply Washington law in interpreting the statutory
12 definition of "child." To the contrary, 20 C.F.R. § 30.1 provides that
13 the Director of OWCP and his or her designees have exclusive authority
14 to administer, interpret, and enforce EEOICPA's provisions. FAB may
15 reasonably conclude, therefore, that Washington law is not controlling
16 in analyzing Plaintiff's claim. (Ct. Rec. 505.)

17 **3. Portrayal of Plaintiff's Relationship with Ray Jordan**

18 Plaintiff next argues that Defendant distorted the factual record
19 to diminish his status as Ray Jordan's child. Defendant responds that
20 these allegations are unfounded and denies misrepresenting,
21 mischaracterizing, or omitting any facts.

22 There is no evidence to support Plaintiff's assertion that facts
23 were distorted to diminish his relationship with Ray Jordan. Moreover,
24 even assuming that Plaintiff and Ray Jordan exemplified a paradigmatic
25 parent-child relationship, FAB can still deny Plaintiff's claim because
26 he does not fall within the statutory definition of "child." There is

1 no evidence demonstrating that FAB's factual findings lead to an
2 arbitrary or capricious decision.

3 **4. Due Process**

4 Finally, Plaintiff argues that he has a due process right to have
5 his *de facto* child status considered within the statutory definition
6 because he maintained an intimate, long-term familial relationship with
7 Ray Jordan. Defendant again responds that Plaintiff's status and
8 relevant familial circumstances were fully considered in the FAB
9 decision.

10 Plaintiff's argument is nothing more than a restatement of his
11 original argument, that is, that FAB failed to consider expanding the
12 statutory definition of "child" to include *de facto* children. For
13 reasons articulated above, Plaintiff's claim is properly denied.
14 Plaintiff cannot show that the FAB failed to consider his status within
15 Ray Jordan's family or his *de facto* child argument.

16 **III. CONCLUSION**

17 The Court recognizes and is respectful of Plaintiff's parent-child
18 relationship with Ray Jordan. But it is the DOL's responsibility - not
19 the Court's - to thoughtfully consider a claimant's eligibility for the
20 EEOICPA \$150,000 lump-sum payment.² The record reflects that Defendant

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22 ²Plaintiff insinuated at the hearing that Defendant deliberately
23 stalled deciding whether coverage existed in an effort to avoid payment.
24 Defendant squelched this suggestion by noting it is undisputed that Ray
25 Jordan's step-son is eligible to receive the \$150,000 lump-sum payment.
26 The only question is whether this payment will be divided between

1 did thoughtfully consider Plaintiff's claim, deliberately and serially
2 examining each piece of new evidence that Plaintiff provided. Because
3 FAB fully considered Plaintiff's arguments before denying them - which
4 was within their authority to do - there is no basis to overturn their
5 decision.

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 82**) is **DENIED**;
8 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 79**) is **GRANTED**;
9 3. Judgment shall be entered in Defendant's favor; and
10 4. This file shall be **closed**.

11 **IT IS SO ORDERED.** The District Court Executive is directed to enter
12 this Order and provides copies to counsel.

13 **DATED** this 5th day of September 2008.

14
15 S/ Edward F. Shea
16 EDWARD F. SHEA
United States District Judge

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Plaintiff and Mr. Jordan's step-son or not.